



PUBLIC PARTICIPATION IN COURT ADMINISTRATION

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DECLARATION

I confirm that:

- This dissertation represents my own work;
- This dissertation, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text
- The contribution of any supervisors and others to the research and to the dissertation was consistent with normal supervisory practice.

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ABSTRACT

This dissertation examines the role that citizens can play in the administration of courts from a policy formulation point of view. Citizen participation is increasingly being considered a valuable element of citizenship and decision-making. Many theorists claim that citizen participation has positive effects on the quality of democracy.

It examines the issue of public participation in Kenyan Courts in addition to finding out if the quality of justice will improve if citizens who are affected by administrative policies of the Judiciary are granted the opportunity to influence those decisions.

To explore the role which the citizens may play, this dissertation analyses the laws on which such activities may be based and the various ways through which the judiciary may reach many people if it were to decide to involve the citizens in policy making.

LIST OF CASES

Krippendorf v. Hyde, 110 U.S. 276, 285 (1884).

Federation of Women Lawyers Kenya (FIDA-K) & 5 others v The Attorney General & The Judicial Service Commission (2011) eKLR.

Beauregard v. Canada, (1986] 2 S.C.R. 56.

Van Rooyen v. State, 2002 (8) BCLR 810 (CC), 2002 SACLRL EXIS 18.

CHAPTER I

1.1: INTRODUCTION

Since its inception, M-PESA has picked up remarkably quickly, covering the majority of geographic areas of the country. It aimed to attract 250,000 customers in its first year, and reached that milestone in only four months. About 1 million customers registered with M-PESA by the end of year one. By August 2009, over 7.7 million Kenyans (about 38 percent of the adult population) had become registered users of M-PESA, far exceeding projections.

As of January 2010, that number was over 9 million. The monthly value of person-to-person transfers was over KSH 26 billion (approximately U.S. \$330 million) in December 2009. There was also a phenomenal growth in the number of agents, from 7,000 in March 2009 to almost 17,000 in January 2010. These agents are located throughout urban and medium-to-large market centres in the country.¹

In contrast to the above, one could not pay a court fine through M-PESA and yet it had proven to be a reliable, legal and efficient method of payment. One still had to pay their court fines or bonds at the Kenya Commercial Bank branches and the disadvantage of this was that payment required physical presence at the bank in addition to the method being limited by time since one could only pay fines between 8am and 4pm.

The thought of this situation led me to discover that there was more to this problem than what met the eye. The problem was the fact that the judiciary, in as much as it was a public institution, was being run like a members only club and the citizens had no real and effective channel of airing their problems.

The aim of this study is to generate ways through which the Judiciary can involve Citizens in its Administrative law making process and to analyse the problems that may emerge in the course of doing so.

¹ Plyler M, Haas S & Nagarajan G, Community-Level Economic Effects of M-PESA in Kenya: Initial Findings, Bill & Melinda Gates Foundation, 2010, 1.

1.2: BACKGROUND.

In the year 2010, Kenya adopted a new Constitution which embraced governance through devolution. One reason for having devolved governance was a widespread feeling of alienation from the central government among the peoples due to over concentration of power on the national executive. Most Kenyans felt neglected and deprived of their resources and they attributed this problem to the various government policies over which they had no control².

The Constitution of Kenya Review Committee responded to this inadequacy by proposing a devolved system of governance with one of its objects as political citizenship³. For example, through the Constitution, citizens were empowered to participate in the two arms of Government: The Executive and The Legislature. This is mainly through voting rights and Articles 1 (1),⁴ 69,⁵ 118,⁶ 201,⁷ 184⁸ and 174⁹ of the Constitution which give the citizens a voice in these arms of Government.

The laws seem to grant Citizens the powers and rights to participate in Court processes. For example, Article 159 vests judicial authority in the people of the Republic of Kenya while Article 232 requires all state organs to involve the public in policy making. However, legislators forget that openness in the Judiciary does not stop with court proceedings. The citizens also have to be involved in judicial administrative law processes since they are the main court users. Their involvement has the potency of making up for deficits in the structured democracy such as bureaucracy and accountability systems since democracy in itself is not a perfect system¹⁰.

²<http://www.arrforum.org/publications/occasionalpapers/40/94-devolution-restructuring-the-kenyan-state.html> (Ghai Y, Devolution: Restructuring the Kenyan State, 2007).

³ Constitution of Kenya, article 174 (c)

⁴ This Article states that Sovereign Power belongs to the people of Kenya and they may exercise this power directly or through democratically elected representatives. The citizens delegate their powers to state organs who in turn have to exercise the delegated powers in accordance with the Constitution.

⁵ This Article places an obligation on the State in that it has to encourage public participation in the management, protection and conservation of the environment.

⁶ This Article makes Parliament more accessible to the citizens. It states that Parliament shall facilitate public participation and involvement in the functions of parliament and its committees.

⁷ This Article requires public participation in financial matters so as to ensure openness and accountability with regards to public finance in the Republic of Kenya.

⁸ This Article requires the implementation of national legislation which shall be used to govern and manage urban areas and cities. The contents of this Act should provide for participation by residents in the governance of urban areas and cities.

⁹ This Article spells out the objects of devolved governance which includes giving power to the people and to enhance the participation of people in the exercise of powers of the state and in making decisions affecting them.

¹⁰ <http://www.britannica.com/topic/democratic-deficit>. accessed March 24, 2016.

Courts play a major role in the deliberative process and through this, they help society resolve some of its major economic, political, and social problems¹¹. However, for courts to establish and maintain their legitimacy and independence, there is need to involve Citizens in their administrative decision making. This issue is highlighted in the Judicial Transformation Framework¹² which states that public confidence in the justice system has been greatly undermined due to the fact that the judiciary has been insular and remote both in its poise and processes which has subsequently led to misunderstanding among the public¹³.

Furthermore, decisions tested by open, public participation bring more information and ideas to the decision-making process and more understanding of the potential costs of and barriers to implementation¹⁴. Law is a means to a social end, rather than being an end in itself, and therefore it should be evaluated in terms of its effect. If everyone in a society refused to follow a law, then it stops being binding and has no effect. Therefore, in order to avoid such a scenario, there is need to involve the society in the decision making.

The aim of this study is to generate ways through which the Judiciary can involve Citizens in its Administrative law making process and to analyse the problems that may emerge in the course of doing so.

1.3: PROBLEM STATEMENT

Baron Charles de Montesquieu advocated for the long lost idea of a republic form of Government in which there was to be three arms of government, which exercised oversight over each other through a system of checks and balances which were constant and ever-present in nature. He further stated that a republic is a system of governance in which power is held by the people or by a representative of their choice.

The judiciary is one of the three arms of government. The judiciary is the arm through which the public are meant to hold the government accountable. This calls for both the independence of the institution and encouragement of citizens to use the institution.

¹¹ Gargarella R, Democratization and the Judiciary, Frank Cass, 2005, 146.

¹² This is a document developed by the Judiciary of Kenya and it lays the foundations for the transformation of the Kenyan Judiciary.

¹³ <http://www.judiciary.go.ke/portal/assets/downloads/reports/Judiciary's%20Tranformation%20Framework-fv.pdf>, 4.

¹⁴ Gargarella R, Democratization and the Judiciary, 15.

Courts are meant to serve the citizens of the respective jurisdiction. However, how are courts to serve those from whom it has alienated itself? The public tends to be involved scarcely in matters court save for when there is a particular and specific problem. In as much as the judiciary is founded on democratic principles, courts appear to be public institutions run in privacy. Policy making in courts is a private process in as much as it does not involve adjudication.

Past occurrences tend to point towards the fact that only lawyers and other politically connected individuals are conversant with the needs of courts. This is evident through the various appointments to judicial reform committees which are usually composed mainly of lawyers and eminent personalities. For example, the committee that was appointed by the late Chief Justice Z.R. Chesoni to help propose remedial measures with regards to the rot in the judiciary was composed of three lawyers and three other eminent personalities¹⁵.

Citizen's involvement in making policies that affect the administration of courts occurs mainly through one shot events whose aim is usually to solve one isolated problem or to satisfy one special interest group. For example, in order to improve access to justice, the Judiciary decided to adopt Alternative Dispute Resolution mechanisms including traditional ones. There was citizen involvement in this process but unfortunately they were only involved in developing the idea rather than during its implementation.

Failure to involve the public in court administration may be an impediment in the provision of justice to all.¹⁶ When people get alienated from an institution they are meant to use, they lose hope in it. The end result is that only those who can afford advocates seek justice in Courts. Those without means prefer to keep quiet when injustices are done to them.

Access to justice may have an effect of a change in the living conditions of marginalised populations. Promoting the importance of this right, and therefore of the rule of law, implies strengthening

Furthermore, justice is an essential pillar for the effective implementation of human rights. In the absence of transparency and accountability of State institutions, and of opportunities for rights-holders to participate in the justice process, people are deprived of their right to access

¹⁵ The committee was headed by Justice Richard Kwach which had among its ranks, three eminent personalities: Hon. Aggrey Muchelule; and Hon. Jessie Lesiit and Hon. William Ouko as Joint Secretaries.

¹⁶ Okechukwu O, Seeking Justice is Transitory Societies, Brooklyn Journal of International Law, 2007, 18.

to justice which subsequently makes it all the harder for them to realise their other human rights.

There is need to begin viewing access to justice as entailing more than improving an individual's access to courts or guaranteeing legal representation. It must be defined in terms of ensuring that legal and judicial outcomes are just and equitable. And for this to happen, there have to be both efforts and mechanisms to involve the citizens in the administration of courts.

1.1: CHAPTER BREAKDOWN

Introduction.

This chapter introduces us to the problem the author is trying to address. It contains the introduction to the problem and why the problem is actually something that has to be dealt with.

It also contains a brief breakdown of the chapters contained in this piece of work in addition to the methodology used in the preparation of this dissertation.

Public Participation in The Judiciary; Theory and Practice

This chapter contains a summary of the theory behind citizen participation in general and within the Judiciary. It includes the definition of terms in addition to a description of public participation methods around the world contrasted to those in Kenya.

It also contains a detailed and in depth analysis of the already existing literature in this area through which the author intends to highlight the gaps which his dissertation will address.

Legal and institutional framework

For any theory or ideology to prosper, as a basic requirement, there is need for a strong foundation. This chapter contains an analysis of the already existing laws which affect the judiciary in addition to the laws which the citizens can rely on when demanding participation in the policy making process of courts of law. This will mainly be an analysis of the Constitution of Kenya (2010) and the Judicial Service Act,

Enforcement of participation laws.

Most of the times, systems fail not because they are insufficient or inadequate but rather because they are not enforced. This chapter discusses the various ways through which these citizen participation laws can be enforced by the citizens in the event that they are not followed.

It includes an analysis of the roles that the various stakeholders can play in advancing the involvement of Citizens in the administration of the Judiciary. The channels will be mainly through the stakeholders in the justice system who include the judges, lawyers, and the Media.

Emerging issues, Recommendations and Conclusions

Rarely does unconventional wisdom fit properly in society. It has to cause friction and meet resistance in its implementation. This chapter will analyse the possible problems that may arise and how they can be tackled.

It will also highlight the impact of the enforcement of citizen participation laws to access to justice and the role it plays with regards to promoting the rule of law.

CHAPTER II

2.1: CITIZEN PARTICIPATION

The terms public participation, citizen participation, political participation, and civic engagement are often used interchangeably while in reality, they each reflect different phenomenon.¹⁷ Public participation encapsulates a broader range of participatory activity. The term public participation is mostly used to refer to the participation of all stakeholders such as the public, media and other institutions. Political participation in its narrowest sense reflects the act of voting or contacting elected officials and, more broadly, refers to involvement in political campaigns and party politics¹⁸. However, my research will be focussed on citizen participation. I will focus on the role played by citizens in the process of administrative decision making or involvement in making service delivery and management decisions¹⁹, all these with regards to courts.

Citizen participation is a debate that is often surrounded by dilemmas and ambivalence. The main problem with regards to this debate is usually the level of participation that the citizens should be allowed.²⁰ On one side of the debate are those who believe that citizens should have a direct and active role in governance. This means that the citizens actively monitor the actions of the state to ensure that government entities do what is right, perform as expected, and act in the best interest of the public.²¹ This is the so called high citizenship as defined by Aristotle in his book *Politics* (Πολιτικῆ) and promoted by Richard Flatham, in which citizens are free, equal, and engaged with one another in pursuing matters of high and distinctively human import²². In summary, for them citizenship is a distinctive human activity and the distinctively important feature of a political society. A similar position is also held by Jean Jacques Rousseau.²³

¹⁷ Callahan K, Elements of Effective Governance, Taylor and Francis, 2007, p150

¹⁸ Verba S and Nie H, Participation in America: Political Democracy and Social Equality, Chicago Press, 1987.

¹⁹ King S, Feltey M and Susel B, The question of participation: Toward authentic participation in public administration, Vol 58, Public Administration Review (1998), 317.

²⁰ Stivers, C., The public agency as Polis: active citizenship in the administrative state, Vol 22, Administration and Society, 1990, 86.

²¹ Frederickson H, Recovery of Civism, Vol 42, Public Administration Review, 504.

²² Flatham, R., Citizenship and authority: a chastened view of citizenship, Vol 30, News for Teachers of Political Science (1981), 9.

²³ Rousseau J, Du contrat social ou Principes du droit politique, Amsterdam: M. M. Ray, 1762.

On the other side of the debate are those who favour and support representative democracy and indirect participation.²⁴ Those who hold this position believe that citizens elect representatives to act on their behalf and trust professional administrators to fairly and efficiently implement public policy. Flatham refers to this as low citizenship and according to him, is held by those who believe that the former type of citizenship (high citizenship) is unachievable in, and hence, irrelevant to political life.²⁵

While addressing the issue of citizen participation in our courts, I will strive to answer the following questions but in different paragraphs;

- Should citizens be included in the decision-making processes of courts?
- If so, what is the best way to involve them and when should it happen?
- How much citizen participation is appropriate? What happens when there is too much participation?

2.2: LITERATURE REVIEW

In 1969, Sherry Arnstein wrote about the different degrees of citizen involvement in governmental decision making²⁶. At the lower level, the participation was manipulative which meant that citizen groups had to determine whether or not they truly want to participate in such a collaborative process. At the middle level, participation was incentivised participation which meant that citizens would only participate if the process matches its promise and subsequently, they would maximize their influence in it.²⁷ At the top of the latter, the participation was in the form of delegated power and partnerships. Here, it was up to the citizens to recognize and capitalize on the long term ramifications of their participation and take advantage of the same.²⁸

Citizens can now find themselves an equal partner with government. They are involved in setting policies, establishing programs and making other decisions that affect the communities in which they live. They are involved in making decisions governing the management of public resources from local to national levels over which they used to have very little influence.²⁹

²⁴ Flatham R, *Citizenship and Authority*, 9.

²⁵ Flatham R, *Citizenship and Authority*, 10.

²⁶ Arnstein, S, *A Ladder of Citizen Participation*, Vol 35, No. 4, *JAIP* (July 1969), pp. 216-224.

²⁷ Arnstein, S, *A Ladder of Citizen Participation*, 218.

²⁸ Arnstein, S, *A Ladder of Citizen Participation*, 220.

²⁹ Wondolleck J, Manring N and Crowfoot J, *Teetering at the Top of the Ladder: The Experience of Citizen Group Participants in Alternative Dispute Resolution Processes*, Vol. 39, *Sociological Perspectives* (1996), 249-262

In a U.S Supreme court case, the court held that the purpose of allowing parties to intervene in a legal action, is to prevent a "failure of justice."³⁰ The main means of such citizen participation in the judicial system includes the jury system, alternative dispute resolution and a non-partisan judiciary. These new forms of participation require new strategies and skills, not only by citizens but also by their government. Different authors have different views on the above matters.

2.2.1: The Jury

The right to trial by jury for serious criminal matters and some civil matters has always been the hall mark of citizen involvement in courts. In English medieval law and custom, the notion of the jury trial as judgment at the hands of one's neighbours had already taken root. Local residents had become accustomed to being gathered in an inquisition in which they served as witnesses to facts about which they had some knowledge, not to act as impartial observers.³¹

Democracy is based on the idea that elected officials and public agencies carry out the will of the people. The citizens' jury is a mini public or a method of deliberative democracy where participants are randomly selected, often through stratified random sampling, so as to be broadly representative of the demographics in the area.³²

However still, the jury doesn't allow the citizens to make policies. It is necessary for a decision-maker to be perceived as a policy-maker, the jury does not qualify by this criterion³³. Individual cases decided with the help of a jury rarely have an impact or have been the reason of a change in legislation. Jury decisions rarely go unnoticed.

Furthermore, the decisions of a jury are usually directed towards a unique set of circumstances concerning activities that occurred in the past. Unlike the decisions of appellate courts which establish precedents and rules that function to govern future conduct, the decisions of a jury are not prospective in nature and only prescribes for the particular parties in a case. If policy-making is the setting of courses of action it is questionable whether anything as ex post facto in character as the activities of a jury warrants inclusion under the heading of policy-making.³⁴

³⁰ Krippendorf v. Hyde, 110 U.S. 276, 285 (1884).

³¹ James A, A Brief Narrative of the Case and Trial of John Peter Zenger, New York Weekly Journal (1963).

³² <http://jefferson-center.org/what-we-do/citizen-juries/>, Accessed on 20th October 2015.

³³ Ranney A, "The Study of Policy Content: A Framework for Choice," in Political Science and Public Policy, Markham, 1968, 7.

³⁴ Bauer R, "The Study of Policy Formation: An Introduction," in The Study of Policy Formation, The Free Press, 1968, 3.

2.2.2: Alternative Dispute Resolution

Blomgren-Bingham,³⁵ Nabatchi³⁶ and O'Leary³⁷ state that quasi-judicial forms of citizen participation such as alternative dispute resolution are methods used by arms of government to achieve authentic citizen participation in decision making. In addition to this, they state that the function of alternative dispute resolution is to incorporate community values into the legal decision making process.³⁸

In traditional legal forums, complex disputes frequently are simplified and settled on the basis of narrow technicalities; the actual substance of the dispute may not even be addressed. Collaborative effort enabled the citizens to satisfactorily address the issues at stake

Collaborative efforts between citizens and government representatives such as judges has enabled participants to broaden not only the issues of concern, but also the potential solutions.³⁹ Group problem-solving techniques led to an increased awareness of the range of possible alternatives since the participants are freed from the narrowness and restrictions of a purely legal dispute.⁴⁰

Such collaborative interactions lead to more creative and acceptable outcomes. Improved communications between groups also increases the chances of successful implementation of decisions. Furthermore, a well-structured collaborative process can remedy some of the imbalances and other stumbling blocks such as access to decision-makers and the decision-making process inherent in traditional forums.

³⁵ Lisa Blomgren Bingham is a Keller-Runden Professor of Public Service and director of the Indiana Conflict Resolution Institute (ICRI) at Indiana University's School of Public and Environmental Affairs. She is involved in conducting field research and program evaluations on dispute resolution, environmental conflict resolution, consensus building, and related processes.

³⁶ Tina Nabatchi is a doctoral candidate in the public affairs program at Indiana University's School of Public and Environmental Affairs and the research coordinator for the Indiana Conflict Resolution Institute. Her research interests include public management, public policy, and law, particularly in relation to conflict resolution, deliberative democracy, and sustainable development administration.

³⁷ Rosemary O'Leary is a distinguished Professor of Public Administration, with additional appointments in political science and law, at the Maxwell School of Syracuse University. Her areas of research include public management, dispute resolution, environmental policy, and law.

³⁸ Bingham L., Nabatchi T and O'Leary, R, *The New Governance: Practices and Processes for Stakeholder and Citizen Participation in the Work of Government*, Vol 65, *Public Administration Review*, (2005), 547-558.

³⁹ Reich R, *Policy making in a democracy: In The Power of Public Ideas*, Harvard University Press, 1990, 123-156.

⁴⁰ Applegate J, *Beyond the Usual Suspects: The Use of Citizens Advisory Boards in Environmental Decision-making*, Vol 73, *Indiana Law Journal* (1998), 910.

2.2.3: Non Partisan Judiciary.

The function of the judiciary is to resolve disputes and to interpret statutes. Most people believe that judges should be appointed through non-partisan elections. This election does not permit party labels to appear on the ballot⁴¹. This non-partisan system of appointment is intended to take the judiciary out of politics. The reasoning seems to be that the other positions are political but that judges and the judicial function are or should be non-political.

However, since it is hard to isolate the decisions of judges from their social, political and cultural background, one can conclude that Judges are therefore partisan political officers vested with political authority whose use is affected by partisan dispositions⁴².

Judges have been vested with great authority and subsequently, it must be accepted as a fact that they formulate public policy. It seems logical, therefore, that judicially determined political policies should and must conform to the will of the people.

If the judiciary fails to carry out the desires of the majority of the people, then as Abraham Lincoln said, "The people will have ceased to be their own rulers having resigned their government into the hands of that eminent tribunal."⁴³

Some jurisdictions such as Sweden choose to have lay judges so as to guarantee effectiveness by keeping judicial decisions in line with social values.⁴⁴ The involvement of lay people offers an element of popular participation as a corrective to formal legal rationality.⁴⁵ It ensures that the law does not reflect only adherence to formal legality, but also substantive standards of fairness. In Russia for example, President Yeltsin re-introduced the concept of lay judges and mixed courts, which had been introduced by the Bolsheviks in 1917,⁴⁶ in a move to make the courts more credible. Previously, professional judges were viewed as instruments of the

⁴¹ <http://jcebmo.org/node/88> (Accessed on 11th November 2015).

⁴² Taft, *Our Chief Magistrate and His Powers*, 1925 (2nd edition), 78.

⁴³ Haynes, *The American Doctrine of Judicial Supremacy*, 1932, 375.

⁴⁴ *Future jurors* (Report from The Lay Manna Committee), Stockholm 2002, 53.

⁴⁵ Bell J, *Lay Judges*, Vol 5, *Cambridge Yearbook of European Law* (2002), 295.

⁴⁶ Pashin S, *The Reasons for Reintroducing Trial by Jury in Russia*, Vol 72, *International Review of Penal Law* (2001), 253.

communist regime and the introduction of lay judges was meant to counter their influence and contribute to just verdicts and to ensure that accused persons got fair trials.⁴⁷

The above methods of citizen participations are not conclusive since they fail to transcend above the judicial process. There is need to ensure that citizens are involved in court administration too and not judicial processes only.

2.2.4: Policy Making

Policy making is defined by Ronald Dworkin⁴⁸ as the effort by government actors to produce socially desirable results. More specifically, it is a conscious effort by government actors to intervene in the social and economic spheres to improve the citizenry's quality of life. Such efforts are the defining feature of the administrative state, and constitute the rationale for the structure of modern government.

Citizen participation requirements, have the dual function of assisting the people in the exercise of their constitutional rights of access to government and helping state and local governments identify the needs of the diverse groups which are to be addressed fairly and equitably under various laws.

The citizens can participate in courts as litigants, witnesses, members of juries, public interest group litigations or through alternative dispute resolution. This is much still limited considering the fact that we are in a democratic state. Furthermore, in as much as citizens have opportunities to participate as litigants or witnesses, effective participation is still hampered by unnecessary delays and adjournments. Innocent persons for example have been known to plead guilty to minor offences just to get the court process over with and witnesses sometimes find excuses to avoid appearing in court

Rules such as those governing class actions, evidentiary privileges, and attorney conduct, for example, have societal consequences. Frequently, however, the citizen has little or no

⁴⁷ Franz H, *New developments in criminal law of Russia. In the new codifications in Russia, 1997*, Berlin Verlag Arno Spitz, 1996.

⁴⁸ Dworkin R, *Hard Cases*, Vol 88 Harvard Law Review (1975), 1069.

opportunity prior to adoption to participate in an evaluation of these rules. In addition to this, the scope of public process in state judicial rulemaking has been discussed very little.⁴⁹

2.3: PUBLIC PARTICIPATION AND COURTS

The virtue of Justice can be demonstrated in four different ways; Distributive, procedural, retributive and restorative. Over the years, courts have evolved in terms of the justice people could seek from them. Before the advent of Equity, the justice available was heavily procedural and retributive in nature. One could only seek redress for certain wrongs which were defined in law. However, equity arose to correct this problem and once again, courts of law issued restorative justice. However, as human rights have developed, little by little courts are beginning to be influenced by distributive justice. This perhaps is due to the fact that the outcome of anything is heavily dependent on those involved. For example, when lay judges are involved in a matter, the outcome is more wholesome since they have to fully understand the matter in question while professional judges already trained in legal matters and have already had similar cases in their career. Subsequently, professional judges tend to make many assumptions in the course of their duty.⁵⁰ Furthermore, in the history of Kenya, we have seen how the lack of participatory structures has aggravated inequalities in society⁵¹.

Justice Isaac Lenaola,⁵² while addressing the Judges at the Judges Colloquium,⁵³ echoed the words of Justice B. McLachlin,⁵⁴ who had earlier stated that *“the courts, if they are to be relevant and responsible, must...operate in the real world...in a manner which furthers democratic principles and promotes perceptions and reality of the rule of law.”*⁵⁵ This statement reflects the impact human rights is having on Courts. Rights appear to be the solution to making courts more accessible to everyone. In Kenya, Article 19 (2) of our constitution

⁴⁹ Grau, *Judicial rulemaking: administration, access, and accountability*, 1978, 52.

⁵⁰ Klaus E, *Honorary judges: Empirical Investigation of their selection and function*, Frankfurt Athenaeum, 1972.

⁵¹ Lando s, *Class Formation and Inequality in Kenya*, 2009, see generally.

⁵² Justice Isaac Lenaola is a judge of the High Court of Kenya where he presides over the Constitutional and Human Rights Division of the Court. He is also a deputy principal judge of the East Africa Court of Justice. In addition to serving as a judge in a Special Residual Court for Sierra Leone by the UN in conjunction with the Government of Sierra Leone.

⁵³ Kenya Annual Judicial Colloquium, Mombasa, August 2011.

⁵⁴ Justice Beverley McLachlin is the 17th and current Chief Justice of the Supreme Court of Canada, the first woman to hold this position, and the longest serving Chief Justice in Canadian history. She also serves as a Deputy of the Governor General of Canada.

⁵⁵ McLachlin B, *The Charter of Rights and Freedoms: A Judicial Perspective*, 23 U.B.C.L. Rev (1989), 586.

states that the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.

Article 159(1) of the Constitution recognizes that 'Judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under the Constitution. The position taken by Kenya is that of low citizenship whereby there is indirect participation by the citizens in the matters of the Judiciary. Furthermore, this also implies that justice has to be exercised in a manner that upholds Chapter 4 of the Constitution.

Public participation is important for the following reasons. First, citizens are usually an important source of information especially where the values involved cannot be easily quantified. Secondly, openness within any system puts pressure on the system administrators to follow the procedures set in all cases.

In Kenya, access to public hearings is still restricted and the lack of elaborate guidelines on good practice makes existing rules less effective. Excessive technical and bureaucratic procedures for public involvement along with financial costs make it hard for poor countries to encourage citizen participation effectively. The institutional arrangements as well as the legal backing still remain insufficient to ensure adequate citizen participation and access to the judiciary. For example, the constitution states that state organs should encourage public participation in their affairs⁵⁶. However, there are no rules or laws which clearly outline the whole process.

Lack of involvement of the citizens has added to the degradation of the quality of justice for the majority, while a minority have been able to benefit from the courts. This is due to the fact that both financial and technical hindrances in courts such as high legal and court fees, lack of knowledge about court procedures have ensured that only a few benefit from courts.⁵⁷

In conclusion, Kenya, laws have given far more weight to the power of the public administration than to the opportunities for citizens and the general public. For example, the Constitution of Kenya focuses heavily on the qualifications needed for one to be a judge and

⁵⁶ Constitution of Kenya, Article 10 (2) (a).

⁵⁷ Okogbule S, Access to justice and human rights protection in Nigeria: problems and prospects, Vol 2, Sur, Revista de Inernacional. Direitos Humanos, 2005.

their functions once appointed judges. There is little mention of what role the citizens are to play in the judiciary. This inadequacy has to be addressed.

CHAPTER III

3.1: LEGAL AND INSTITUTIONAL FRAMEWORK.

Regulatory and management decisions by the citizens or their agencies requires a basis in law. This legal authority may be found in constitutional documents, in legislation, in judge-made law, or in convention based on unwritten constitutional doctrine.⁵⁸ Since the scope of consultation by such persons or agencies is an element of the decision making process, the rights of members of the public to participate in agency decisions, if these rights are to be enforced, must also have an explicit legal foundation.⁵⁹

The legislators have endeavoured over time to make governance in Kenya more democratic by involving citizens more and more in decision making. This commitment was reiterated when the new constitution was promulgated and with it came devolved governance. The various injustices of the past have prompted legislators to involve the citizens in decision making since most of the decisions being made usually affect the common good. Nevertheless, such laws are not implemented effectively. As Judy Rosener states, while participation mandates have increased, the focus on participation in terms of effectiveness has not correspondingly increased.⁶⁰ It seems that policy makers are of the opinion that more citizen participation laws and policies will incentivise citizens to participate in the political process.

3.2: THE CONSTITUTION OF KENYA

The Constitution of Kenya is the Supreme law of the land and all other laws derive their validity from it. It will be important to study this important document and to see the impact it has on citizen participation in courts.

3.2.1: Article 159.

⁵⁸ Carter, *The National Energy Board of Canada and the American Administrative Procedure Act-A Comparative Study*, 34, *Saskatchewan Law Review* (1969), 104.

⁵⁹ Lucas A, *Legal Foundations for Public Participation in Environmental Decision Making*, Canadian Arctic Resources Committee, 1.

⁶⁰ Rosener J, *Citizen Participation; Can we measure its effectiveness*, JSTOR (1978).

This article provides the basis of judicial authority in Kenya. It states that judicial authority is derived from the people and vests in the people. This is an extension of Article 1 (1) of the constitution under which the citizens surrender to the state the right to govern in exchange for protection. This makes the government an agent of the people meaning that it has to implement the will of the people and be accountable to them. The Judiciary is an arm of the Government.

The acknowledgement of the people's sovereignty with regards to courts makes the people identify with the courts and regard it as one of their own. Furthermore, such an acknowledgement shows a commitment to involve the citizens in the administration of courts.

3.2.2: Article 166.

It is a common tradition among commonwealth countries that the Head of State. The only new development is that in Kenya, the President appoints judges based on the recommendations of the Judicial Service Commission. Furthermore, the senior most judge in the country, the Chief Justice, and the Deputy Chief Justice have to undergo the scrutiny of parliament. This article informs us about the Kenyan position with regards to citizen participation in courts. The Citizens of Kenya participate indirectly, through elected officials, in the appointment of those involved in the administration of the courts.

This is confirmed in Article 3 (c) which clearly states that power is delegated by the people to the Judiciary. The citizens do not directly exercise their powers.

3.2.3: Article 168

Sub Article 2 contains some elements of citizen participation in courts. Through the Judicial Service Commission, they may table a complaint to remove a judge from office due to misconduct. However, in as much as there is involvement of the public, this involvement is ill placed in that it comes towards the end of the chain of activities. Perhaps if the citizens were involved in the whole process, the issue would have been dealt with at its genesis. This calls for citizen participation to be viewed as a preventive method rather than a reactive one.

3.2.4: Article 172

Sub Article 2 (a) provides that the Judicial Service Commission (JSC) should be guided by the principles of competitiveness and transparency in appointing staff and officials of the Judiciary. In appointing the current Chief Justice and his deputy, the JSC invited applications for the positions and published a list of shortlisted candidates through local dailies. In addition, the interviews were aired live on national television.

This provision in the law provides the citizens with a chance to participate in the selection process but in an inactive manner. They are able to access information regarding the ambitions of the candidates and the kind of judiciary they are to expect from every candidate. I believe the citizens can challenge such appointments through the courts as was the case when the Federation of Women Lawyers moved to court to challenge the gender parity in the Supreme Court⁶¹.

3.2.5: Article 232 (1) (d)

This article spells out the values and principles of public service. These values and principle are applicable to all state organs⁶², where state organs include the Judiciary⁶³. Under this article, the public service is required to involve the public in the process of policy making. This includes providing the public with prompt and accurate information to enable them act. The aim of this principle, which is similar for the other principles, is to ensure that the officials exercise professionalism in discharging their duties in addition to utilizing resources efficiently and effectively.

3.2.6: The Bill of Rights

Chapter 4 of the Constitution of Kenya contains relevant provisions which may possible impact on citizen participation in courts. Article 33 provides that all citizens shall have the freedom to express themselves. Article 35 (3) requires the state to publish and publicize any important information affecting the nation. Article 36 (1) grants every citizen the right to join, form or participate in the activities of an association of any kind. Article 37 grants every citizen the right to present petitions to public authorities.

The above rights facilitate public expression in a democracy and give meaning and substance to citizen participation. They are intrinsic to the effective functioning of any democracy. They enable well-meaning and patriotic citizens participate in governance. Justice Sawant⁶⁴ once stated that the barrier to information and lack of citizen participation are the main causes of corruption in society. "It facilitates clandestine dealing and arbitrary decisions."⁶⁵

⁶¹ Federation of Women Lawyers Kenya (FIDA-K) & 5 others v The Attorney General & The Judicial Service Commission (2011) eKLR.

⁶² Article 232 (2) (a).

⁶³ Article 1 (3) (c).

⁶⁴ Justice P. B. Sawant is a former Supreme Court judge in India.

⁶⁵ Obulapathi M, Prevention of Corruption through the Right to Information Act, Vol 3, The Journal of Social Science Researcher (2014), 9.

Article 48 places a duty on the state to ensure access to justice. Capacity building with regards to understanding of laws and courts is indispensable in the quest to provide access to justice. The Federation of Women Lawyers⁶⁶ made an important observation with regards to this. In 2002, while making submissions to the Advisory Panel of Eminent Commonwealth Judicial Experts,⁶⁷ they observed that courts will fail to serve the public interest if their doors are effectively shut to the poor and disadvantaged. The courts need to find a way to involve the Citizens in improving access to justice since this will help solve some of the injustices being currently experienced in Kenya.

3.3: THE JUDICIAL SERVICE ACT

This piece of legislation, among many other things, establishes the National Council on the Administration of Justice⁶⁸ whose function includes inter alia the facilitating of the establishment of court user committees.⁶⁹ The committees, which were a brain child of the Kenya Magistrates and Judges Association, are forums that are intended to bring together, at the county level, all court users so as to enable them participate in finding solutions for the problems facing courts. The Committees were borne out of a need to coordinate responses to criminal and other justice issues by the Judiciary.⁷⁰ They provide an avenue to address in an open consultative approach, a broad range of administration of justice matters both precautionary as well as responsive.

These committees provide the judiciary with an opportunity to make the administration of the justice system more participatory and inclusive since the citizens are represented in the decision making process. Furthermore, the Committees have been found to be extremely useful in terms of improving co-ordination among the different departments and agencies within the system of the administration of justice. One of the most recent results of court user committees is the use of MPESA services to pay for traffic offence fines and having court stations in prisons to speed up hearing of criminal cases.

⁶⁶ Federation of Women Lawyers – Kenyan Branch.

⁶⁷ Nairobi, May 17th 2002.

⁶⁸ Section 34 (1), Judicial Service Act, 2011.

⁶⁹ Section 35 (2) ©, Judicial Service Act, 2011.

⁷⁰ <http://www.cickenya.org/index.php/legislation/itemlist/user/42-cic?start=354> (Accessed on 18th October 2015).

CHAPTER IV

ENFORCING PUBLIC PARTICIPATION LAWS

4.1: THE NEW ROLE OF THE JUDICIARY IN SOCIETY.

The discussions on the legal framework with regards to Public Participation point towards a new type of Judiciary. The new constitution advocates for governance in which the citizens are involved. This was a result of the clamour of many Kenyans to be involved in the administration of the country. In his address, Yash Pal Ghai⁷¹ states that wherever the Constitution of Kenya Review Commission⁷² went to, there was a feeling of alienation among the people who considered that their problems arose from policies over which they had no control mainly because local governance mechanisms had lost their authority and had been deprived of financial resources since independence.⁷³

Under the new Constitution, the arms of government now have to change tact in their dealings with the citizens. The new constitution, through various Articles among them Article 232 (1) (d),⁷⁴ is based on the assumption that governance in the various arms of government is built on democratic citizenship where public administrators serve and empower citizens as they manage public organizations and implement public policy. Subsequently, in this new role, administrators are expected to help citizens articulate their needs, build relationships of trust with and among citizens, and to be more attentive to community values and citizen interests.⁷⁵

The Judiciary is also affected under the new Constitution. The Constitution places emphasis on building public institutions marked by integrity and responsiveness. Articles 159 (1) and 1 (1) read together can be interpreted to mean that judicial power is derived from the people who in turn choose to vest it in the courts. It is clear that the new Constitution is trying to encourage citizens to act as engaged participants and owners of government. Consequently, they are expected to enter into meaningful, reciprocal relationships with government, and in doing so

⁷¹ Yash Pal Ghai was born in 1938 in Nairobi, Kenya. He is a scholar in constitutional law. He has been the head of the Constitution Advisory Support Unit of the United Nations Development Programme in Nepal. Until 2008, he was a Special Representative of the UN Secretary General in Cambodia on human rights.

⁷² Constitution of Kenya Review Commission which was tasked with coming up with a new constitution for Kenya from 2000 to 2004.

⁷³ Ghai Y, *Devolution: Restructuring the Kenyan State*, 215.

⁷⁴ This Article provides for the involvement of the people in the process of policy making.

⁷⁵ Denhardt J & Denhardt R, *The New Public Service*, Sharpe, 2007, 23.

they have a duty to assume an active role in improving government services, making decisions, and challenging government actions.

The implication of the above is that the Judiciary is expected to be more adaptive and responsive to the expectations of citizens in addition to creating the conditions under which citizens can join in deliberation about issues of importance that affect them. The judiciary will soon find itself convening meetings and forums with citizens to develop a better understanding of what the public wants and expects in terms of service provision.⁷⁶ They will also have to partner with various non-profit organizations, and other government agencies in the administration of programs they once managed exclusively on their own.

This particular model of citizen participation requires the citizens to look beyond self-interest to the broader issues of community. This broader vision requires that citizens have knowledge of public affairs, and have the public interest at heart, as well as a bond, or sense of belonging, with the community. The public interest is advanced when citizens and administrators think about the impact of their actions and how their behaviour can contribute to improving societal conditions.⁷⁷

In order to achieve the above, I propose a system in which citizen participation laws are implemented and enforced by involving the various stakeholders who might be affected by the policy in question. This will mean that the role of the administrators in the Judiciary will be transformed from one of controlling to one of agenda setting, bringing the proper stakeholders to the table, and facilitating or negotiating solutions to public problems.⁷⁸ The stakeholders who should be involved with regards to public participation policy enforcement include the Judges, Lawyers and the Media.

⁷⁶ Of late, we have seen various courts across the country trying to get across to the public. This is being done mainly through three ways: Organizing Court Open days, the presence of Judiciary “stalls” at the Agricultural Society of Kenya Shows where citizens can get explanations on the various matters with regards to Courts and lastly through school visits to the various courts in the country.

⁷⁷ Denhardt J & Denhardt R, *The New Public Service*, Sharpe, 2007, 66.

⁷⁸ Denhardt J & Denhardt R, *The New Public Service*, Sharpe, 2007, 84.

4.2: ROLE OF STAKEHOLDERS

Stakeholders can either be individual or collective actors. They can be collective actors such as neighbourhood initiatives, social movements or local/international network enterprises that are composite actors whose purposes are dependent on and guided by the preferences of their members.⁷⁹ In summary, they can be defined as socially organized groups that are or perceive themselves as being affected by a decision.⁸⁰

The face of the public is a changing one. Various persons within the public are affected variedly by different circumstances. For example, the people interested in the location of a railway line are usually those who will be visually affected by the line. This includes those who will be forced to sell their land, which in most cases is their ancestral land, those who will be displaced from their place of residence and as seen recently, activists who take care of the interests of the environment.⁸¹ In other words, there is no single public but a seemingly endless multitude of interests and groups.

The reality is that people participate when they perceive themselves to have a significant stake in the decision being made. That stake may be rooted in economics, use, or other direct impacts, or it may be rooted in values or philosophy. But all in all, people don't participate unless they perceive their interests or values to be affected.⁸²

As earlier discussed, these stakeholders are the ones to help the Judiciary implement and enforce public participation laws. Stakeholders play an important role due to the expertise they have. It is difficult and close to impossible for the Judiciary to possess full knowledge and understanding with regards to the implementation and enforcement of public participation laws and policies in the judicial arm of government. Furthermore, their previous experience is useful when it comes to implementation of policies.

⁷⁹ Scharpf F, *Games Real Actors Play: Actor-Centred Institutionalism in Policy Research*, Westview Press, 1997, 54.

⁸⁰ Renn O, Webler T, Rakel H, Dienel P & Johnson B, *Public Participation in Decision Making: A Three-Step Procedure*. Policy Sciences, Vol 26, Policy Sciences (1993), 202.

⁸¹ <http://www.the-star.co.ke/news/kahumbu-wants-plan-redesign-sgr-halted> (Accessed on 5th December 2015)

⁸² Creighton J, *The Public Participation Handbook*, Wiley, 2005, 23.

4.2.1: Judges

Senior judges in the Judiciary are usually involved in administration of Courts⁸³ and I will discuss the role they can play while forming part of the Administration. To begin with, public participation programs have to be designed in such a manner that they form an integral part of the decision making process.⁸⁴ Judges, as administrators, can ensure that the public participation program that is being designed forms an integral part of the decision making process so as to ensure that the citizens are able to participate in a manner worthwhile of their time.

Furthermore, they are the determinants of whether public participation is a necessity and if so, how are the citizens to participate. In determining this, they have to balance between the nature of the issue, the interest of the public and the resources at the disposal of the judiciary.⁸⁵ For example, not every decision requires the involvement of the public unless it directly impacts on them. It might be a brief and confidential matter that can be deliberated on by the administrators only.

Other judges and magistrates who do not have administrative duties can also be involved in the feedback collection process. During my internship at the Kibera Law Courts, it was almost considered a norm to have every accused person complaining of some inefficiency in the justice system. These inefficiency included misplaced files, lack of proper communication channels between court and prison officials and harassment by officers in the remand area among many other complaints. Such comments could be noted down and deliberated on in future staff meetings.

4.2.2: Lawyers

Lawyers have skills useful for producing social change even outside the litigation realm in addition to having the competency and inclination to promote the values of democracy.⁸⁶ Since lawyers are officials of the court⁸⁷, they can be used by the court in the implementation of the public participation policies due to the fact that they usually have firsthand interactions with the court users.

⁸³ Section 6, Judicial Service Act, No 1 of 2011.

⁸⁴ National Research Council, Carbon Filtration for Reducing Emissions from Chemical Agent Incineration, National Academies Press, 1999, 5.

⁸⁵ Creighton J, The Handbook of Public Participation, 40.

⁸⁶ Carle S, Debunking the Myth of Civil Rights Liberalism, Vol 77, Fordham Law Review (2009), 9.

⁸⁷ Section 55, Advocates Act, No. 18 of 2014.

Since time immemorial, lawyers have acted as critics of the legal systems mostly because of the first hand interactions they have with the justice system. Therefore, their role with regards to public participation can be to determine whether or not the issue in question falls within the jurisdiction of rules or regulations that require public participation. This will mainly be done a posteriori – after the Judiciary has declared its intention to involve the public in formulating a particular policy.

In addition to the above, lawyers can also be useful in collecting information that will help in the streamlining of court processes since they themselves are daily users of the system. An example is a practice which has now become a common feature in most jurisdictions. In many jurisdictions, all cases are scheduled for the time at which the court session begins, although it is obviously impossible for the judge to get to more than a small percentage of the total in the early part of the session. Subsequently, police officers, complainants, witnesses, lawyers and defendants often spend many hours sitting in a courtroom or standing outside waiting for their case to be called – a situation that detracts from the quality, dignity and effectiveness of the criminal justice process.⁸⁸

4.2.3: Media

Most Kenyans have little trust in the Judiciary.⁸⁹ This is mainly caused by the population's lack of knowledge regarding the operation of the administration of justice and a marked interference from other political powers in the work of judges.⁹⁰ This has resulted in many Kenyans mistrusting the work of the Judiciary.

This lack of information is due to the fact that there exists a severe deficit in the media in terms of their capacity to report what is going on in the judicial system.⁹¹ In many cases, journalists and editors lack adequate training to cover and report on the activity of the courts and - an even more complex issue - to explain to society the legal issues that they address in an understandable and simple way.

Furthermore, courts make little effort to communicate the cases they resolve in an appropriate manner. This stems from the cultural heritage of the Common Law court systems, which have

⁸⁸ The Presidents Commission on Law Enforcement and Administration of Justice, Task Force Report: The Court (1967), 134.

⁸⁹ Judiciary Transformation Framework (2012 – 2016), 9.

⁹⁰ According to a study (Judiciary Perception Survey Presentation – September 2012) done by Infotrak Research and Consulting, one of the reasons Kenyans dislike the Courts is because they are easily corruptible, politically influenced and not easily accessible to the public.

⁹¹ Transparency International, Enhancing Judicial Transparency: Policy Position, N° 1, 2007.